IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.49 OF 2003

M.P. State Co-operative Oil Seed Growers Federation Ltd. ... Petitioners

v/s

Desmet Chemfood Engineering Pvt.Ltd. ... Respondents

Mr R.M. Kadam with Mr V.S. Khemka and Mr V.V. Khemka for Petitioners.

Mr F. D'Vitre with Mr D.J. Khambata and Mr Riyaz Chagla i/b M/s Gagrat and Co. for Respondents.

CORAM : D.K.DESHMUKH J.

DATE : 6TH SEPTEMBER 2004

P.C. :-

1. By this petition, the petitioners object to the award made by the Sole Arbitrator dated 19th July 2001. Perusal of the award shows that the learned Arbitrator has awarded various amounts against different claims made by the respondents. The conclusions of the learned Arbitrator are found in paragraph 44 of the award. The learned counsel appearing for petitioners, at the outset, stated before me that the petitioners are restricting their challenge to the award towards what is awarded by clauses (b), (e), (f), (g) and the award for payment of interest contained in paragraph 45. The relevant clauses read as under :-

> "(b) Rs.21,20,774/- on account of the running bills of the Claimant which have not been paid by Respondents.
>
> (e) Rs.1,66,000/- for the price of the spares supplied by the Claimant and;
>
> (f) Rs.7,41,324/- being the value of excess material brought by Claimant on the site

and which the Claimant was wrongfully not allowed by the respondent to remove.

(g) Rs.18 lacs as damages quantified as aforestated.

45. The Respondent is liable to the Claimant interest on the aggregate amount of Rs.46,22,096/- at 14 % per annum from 15th June 1996 and on Rs.18 lacs being damages awarded at 14 % per annum from the date of the award till payment or realisation whichever is earlier."

2. Admittedly, there was a contract between the parties. By the said contract, the respondents agreed to design, manufacture, supply, deliver, erect and commission the machinery and equipment for the petitioners' proposed solvent extraction module for 200 TPD Soyabean Processing Complex at Paratwada in Madhya Pradesh. One M/s National Heavy Engineering Co-operative Ltd. was appointed as project management consultants by the petitioners. It appears that the erection of the plant was completed. Thereafter, there were disputes between the parties about successful commissioning of the plant as also about successful

production. The disputes were therefore referred to the learned Sole Arbitrator to the extent referred above as challenged in the present petition.

3. Perusal of the award shows that in paragraph 26, the learned Arbitrator had framed issues. The learned Arbitrator held that so far as breach of contract is concerned, the petitioners and the respondents both are responsible for breach of the contract.

4. Perusal of the award shows that an amount of Rs.21,22,774/- has been awarded by the learned Arbitrator on account of running bill of the respondents which has not been paid by the respondents. The learned counsel appearing for petitioners submits that this award has been made by the learned Arbitrator without giving any reasons and without even referring to this aspect of the matter in the award. The learned counsel submitted that under clause 15, which relates to terms of payment for the goods, 5 % of the contract price of the goods is payable to the respondents after successful commissioning of the plaint till certified by the project management consultants and 10 % of the contract price of goods after successful commercial production for a period of 30 days. In the submission of the

learned counsel, the terms ' successful commissioning' and ' successful commercial production' have been defined by the contract. Therefore, an award for payment of the amount which was retained by the petitioners under clause 15(iv) and (v) could have been made by the learned Arbitrator only after recording a finding that there has been successful commissioning of the plant and thee has been successful commercial production in the plaint. The learned counsel submits that on the contrary, if one goes through the award, it is found that the learned Arbitrator has in fact found that there has neither been successful commissioning of the plant nor successful commercial production in the plaint. The learned counsel submits that in the absence of finding recorded by the learned Arbitrator after giving reasons, the award cannot be sustained. The learned counsel appearing for respondents, on the other hand, submits that as per the contract, price of the goods was fixed, the goods have admittedly been supplied by the respondents, the goods have been retained by the petitioners and therefore, as the goods are retained, in terms of provisions of Sale of Goods Act, the petitioners may be entitled to levy damages. The learned counsel also refers to the recital 119 to show that the amount of liquidated damages corresponds to the amount of retention of money which is permitted by

clause 15 of the agreement. The learned counsel submits that as the learned Arbitrator has found that the petitioners are not entitled to claim damages and as finding is not challenged before this Court, the petitioners cannot say that the respondents are not entitled to the release of retention of money. It is clear from the rival submissions that clause 15 of the contract is relevant for deciding this contention. It reads as under :-

"15.1 Terms of payment for goods shall be as follows :-

(i)(a) 10 % of the contract price of goods shall be paid within 30 days of signing of contract, on submission of claim and a Bank Guarantee of a Nationalised Indian Bank, in format provided at Annexure V of this Agreement for an equivalent amount, valid until whole of the goods as per the Agreement are delivered.

(b) 5 % of the Contract price of goods upon submission of complete set of approved drawings and documents as specified in

the implementation schedule provided at Annexure II of this agreement, a claim for payment and a Bank Guarantee for timely delivery and commissioning from a Nationalised Indian Bank, for 5 % value of the Contract price, in the format provided at Annexure V of this Agreement. This Bank Guarantee shall be valid until the goods are handed over after successful commercial production.

(ii) 65 % of the contract price of goods (against detailed break up cost provided at Annexure I of this agreement) on receipt of gods at site and after the inspection and approval from the Project Management Consultant, within 30 days of due inspection at site.

(iii) 5 % of the Contract price of goods after complete installation of the plant duly certified by the Project Management Consultant.

(iv) 5 % of the Contract price of goods after successful commissioning of the plant duly certified by the Project Management Consultant.

(v) 10 % of the Contract price of goods after successful commercial production for a period of 30 days, duly certified by the Project Management Consultant, and on receipt of a Bank Guarantee of a Nationalised Indian Bank, in the format provided at Annexure VI of this agreement, for an equivalent amount and valid for a period of 12 months for any defect in the quality and workmanship of the equipment supplied."

. Perusal of clauses (iv) and (v) shows that 5 % of the contract price of goods is payable after successful commissioning of the plant and 10 % of the contract price of goods is payable after successful production for a period of 30 days. The term 'goods' is defined by clause 1.1(c) which reads as under :-

"(c). 'The Goods' means all of the equipment, machinery, and/or other materials which the

supplier is required to supply to the Purchaser under the Contract including design, manufacture and technical services thereof."

. Perusal of the award shows that all equipments, machinery including design, manufacture and technical services are included in the definition of the terms 'goods'. The next definitions which are relevant are the definitions of the terms 'successful commissioning' and 'successful commercial production' which are found in clauses 1.1(k) and 1.1(l) which read as under :-

"(k) 'Successful Commissioning' means the performance of the complete goods and services as well as individual equipment therein as per capacities and guaranteed performance parameters demonstrated over a period of 15 days continuously.

(l) 'Successful Commercial Production' means running of the 200 tonnes per day Soyabean Processing Complex at rated capacity and guaranteed performance parameters applicable to the goods and services in supplier's scope for a

period of 30 days. The successful commercial production shall be taken up within 30 days of completion of successful commissioning."

. From the perusal of these terms in the contract, one thing is clear that before issuing a direction for releasing the retention money, it was absolutely necessary for the learned Arbitrator to apply his mind to the material on record including these terms in the contract and then only after recording a finding that there has been a successful commissioning of the plant and successful commercial production, an award for release of retention money could be made. Perusal of the award, however, shows that there is no application of mind by the learned Arbitrator to these aspects of the matter.

5. So far as the the submission of the learned counsel for respondents that as the goods are retained by the petitioners the respondents are entitled to the full price of the goods is concerned, perusal of clause 15 quoted above shows that it deals with the payment of the price of the goods. the petitioners become entitled to retain the amount of 5 % or 10 % of the price of goods if there is no successful commissioning of the

plant and if there is no successful commercial production. The result is that the price of the goods stands reduced by that amount. In any case, the respondents have erred in terminating the contract and it cannot be accepted. So far as clause 19 of the contract is concerned, in my opinion, it has no connection with the retention money though it appears that the amount of liquidated damages cannot exceed the amount of retention money because damages can be levied apart from absence of successful commissioning and successful commercial production also for non-performance of the services within the time specified in the contract. Therefore, damages can be levied for other reasons also. In any case, in my opinion, the award made by the learned Arbitrator on this count is liable to be set aside for the simple reason that the learned Arbitrator has not given any reasons for awarding this claim.

6. So far as the award made by clause 44(e) for payment of Rs.1,66,000/- for the price of the spares supplied by the petitioners is concerned, the discussion is to be found in paragraph 30. The award of the learned Arbitrator in this regard is based on the acknowledgment issued by the petitioners themselves. Perusal of the statement of claim shows that this amount

is claimed in paragraph 21. Paragraph 21 reads as under :-

> "21. The Claimants had supplied various spares under M.T.R. dated 29th January 1992 for an aggregate value of Rs.1,66,659.00. The Respondents have failed and neglected to make the payment in respect thereof. The Claimants submit that the Respondents are bound and liable to pay the Claimants the amounts in respect of the said spares together with interest thereon at 24 % per annum from the date hereof till payment and / or realisation.

. If one goes through the reply that is filed by the petitioners, there is no reply to paragraph 21. I find that as the award in this regard is not based on the documents on record, the award cannot be sustained.

7. The petitioners challenge award of Rs.7,41,324/- awarded by the learned Arbitrator by paragraph 44(f) being the value of the excess material brought by the petitioners on the site which were not wrongfully not allowed to be removed by the respondents. The learned counsel appearing for petitioners invited my attention to the minutes of the meeting, when the respondents

stated that in their statement of claim in this regard, an amount of Rs.15,35,282.28 has been wrongly claimed and that there has been a calculation mistake in relation to the spares and instead of Rs.9,00,000/-, the price of suppliers is Rs.2,000/-. According to the learned counsel, if that is taken into consideration, the total claim of the respondents in this regard comes to Rs.6,37,282/- but the learned Arbitrator has awarded an amount of Rs.7,41,324/-. The learned counsel submits that the learned Arbitrator has stated in paragraph 32 of his award thus :-

> "After some discussion of the amounts the Claimants agreed to delete certain items which were included in the list of excess material filed by the claimants and the final claim, which is liable to be allowed, in this regard is Rs.7,41,324/- with interest thereon.

. The learned counsel submits that this shows that apart from reducing the amount of retention money i.e. Rs.8,98,000/- from their claim, the respondents have also agreed to delete certain items, but the learned Arbitrator has not considered that aspect of the matter. The learned counsel appearing for respondents, on the other hand, pointed out to me by referring to the

written submissions filed by the petitioners that the respondents have, apart from reducing the amount of Rs.8,98,000/-, also deleted certain items and have also committed certain mistakes as a result of which the claim has gone up. Therefore, the learned Arbitrator awarded an amount of Rs.7,41,324/-. The criticism by the learned counsel for petitioners to the extent that the learned Arbitrator has not given detailed reasons while awarding this claim, in my opinion, is justified. However, after having gone through the written submissions filed by both the sides, I find that there is material on record for awarding Rs.7,41,324/- on this count though the learned Arbitrator has not given detailed reasons for arriving at the said conclusion. Therefore, as I find that there is material on record, it will not be prudent to disturb the award in this regard.

8. The next aspect of the matter which is challenged is award of Rs.18,00,000/- as damages. The learned counsel appearing for petitioners submits that the learned Arbitrator has recorded a finding that both the parties are responsible for breach of the contract. In the submission of the learned counsel since there is a finding recorded that both the parties are responsible for committing breaches of the contract, there could

have been no award made or damages. The learned counsel further submits that there are also no reasons given by the learned Arbitrator while awarding Rs.18,00,000/- towards damages. I have also heard the learned counsel for respondents in this regard. After having heard both the sides and after having gone through the record, I find that the award of the learned Arbitrator in this regard cannot be sustained. While awarding the claim, the learned Arbitrator in paragraph 43 has observed thus :-

> "The aggregate of the aforesaid amounts which are set out as Annexure VI to the statement of claim comes to Rs.68,56,933/-. In my view, it is not necessary to go into the details of these claims because as I have already pointed out, the claimant is itself guilty of several defaults and the claim for damages made by the claimant is liable to be cut down on that score. Apart from this, in the absence of oral testimony, which can be tested by cross-examination, it is difficult to place complete reliance on the figures mentioned in the documents filed by the complainant. For example, it is difficult to believe that two engineers of the claimant remained at the site

for two and half years and were paid Rs.15,000/- per month without doing any work at all. It is difficult to believe that during this period, they could not or did not attend to any other work for the claimant. There appears to be quite some element of exaggeration in the amount claimed. In any event, it appears that the claimant made no serious attempt to mitigate the damages. In these circumstances, in my view, it would be appropriate to award to the claimant only Rs.18 lacs in the aggregate for damages."

. In my opinion, the bare reading of this paragraph quoted above from the award is enough to set aside the award for that reason. it is impossible to allow the respondents to levy damages with a finding that the respondents have also contributed to the petitioners. The award in this regard therefore is liable to be disposed off. The last item under challenge is award of interest at the rate of 15 % p.a. it appears that the leaned Arbitrator has awarded interest under the provisions of the Sale of Goods Act. The supply was made from the year 1989 when the rate of interest is high. Award of interest at any rate is in the discretion of the Arbitrator. Therefore, I do not

find any reason to disturb the finding in this regard. With the result therefore, petition succeeds in part and is allowed. The award made by the learned Arbitrator in respect of payment of Rs.21,20,774/- on account of running bills of the respondents which have not been paid by the petitioners is set aside. The award made by the learned Arbitrator for payment of Rs.18,00,000/- towards damages are set aside. Rest of the award is confirmed. As a result of dismissal of the petition now, the award as modified by this order is made rule of the Court. At this stage, a request is made on behalf of the petitioners for stay of execution of the decree passed pursuant to the award. The decree is money decree, therefore, there is no question of staying the execution. The request is rejected.

. Parties to act on the copy of this order duly authenticated by the Associate / Personal Secretary as true copy.

. Certified copy expedited.